UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

PHIL GORDON,

Plaintiff,

v. 22 Civ. 2138 (JMF)

BLUETRITON BRANDS, INC.,

Defendant.

----------x

New York, N.Y.
October 20, 2022
10:15 a.m.

Before:

HON. JESSE M. FURMAN,

District Judge

APPEARANCES

JOSEPH & KIRSCHENBAUM LLP
Attorneys for Plaintiff
BY: YOSEF NUSSBAUM
DANIEL MAIMON KIRSCHENBAUM

OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.
Attorneys for Defendant
BY: KELLY MARIE CARDIN
JESSICA ROSE SCHILD

THE COURT: This is in the matter of Gordon v. BlueTriton Brands, Inc., 22 Civ. 2138.

THE COURT: Before I take appearances, a couple of quick reminders:

Number one, please mute your phones, if you can, to ensure there is no background noise distraction. Number two, remember no unmute if or when you wish to say something, and please begin with your name so that the court reporter and I are clear on who is speaking.

Number three, remember that this is a public conference, just as if it would be if we were in open court. And finally, a reminder that it can't be recorded or rebroadcast by anyone.

With that, I'll take appearances, beginning with counsel for plaintiff.

MR. NUSSBAUM: Good morning, your Honor. Yosef Nussbaum from Joseph & Kirschenbaum. And, your Honor, my colleague, Maimon Kirschenbaum is with me as well.

MR. KIRSCHENBAUM: Good morning, your Honor.

THE COURT: Good morning to both of you.

For defendant?

MS. CARDIN: Good morning, your Honor. Kelly Cardin from Ogletree, Deakins for the defendant.

MS. SCHILD: Good morning, your Honor. Jessica Schild from Ogletree, Deakins for defendant as well.

THE COURT: Good morning to both of you as well.

Let me start with my ruling on motion to dismiss:

By bottom-line order dated October 13, 2022, I denied Defendant's motion to dismiss for reasons to be explained here. See ECF No.43. I will explain those reasons now.

At the outset, though, I note that the majority of Defendant's precise arguments have been considered and rejected by a number of other judges in this Circuit, including Judge Failla in Gillett v. Zara USA, Inc., No. 20-CV-3734 (KPF), 2022 WL 3285275(S.D.N.Y. Aug. 10, 2022); Judge Kovner in Rodrigue v. Lowe's Home Centers, LLC, No. 20-CV-1127 (RPK), 2021 WL 3848268 (E.D.N.Y. Aug. 27, 2021), and Caul v. Petco Animal Supplies, Inc., No. 20-CV-3534 (RPK), 2021 WL 4407856 (E.D.N.Y. Sept. 27, 2021); and Judge McAvoy in Mabev. Wal-Mart Assocs., Inc., and I follow them here. 2022 WL 874311 (N.D.N.Y. Mar. 24, 2022). Their opinions are thorough, well-reasoned, and persuasive, and I follow them here. That would be enough to deny Defendant's motion, but I will add a little more flesh to these bones.

First, I conclude that there is Article III standing, for substantially the same reasons that Judge Failla explained in Gillett at *5-7 and Judge Kovner explained in Caul at *4.

Put simply, the late payment of wages is a concrete harm. Monetary injury is a quintessential injury-in-fact, and there is an economic cost to the delayed receipt of money. Moreover, Plaintiff alleges in his complaint not only that

he"lost the time value of money," but also that he was "unable to do those things that every person does with their money, such as paying bills or buying goods that he needed or wanted to buy." Compl. ¶51.

Assuming the truth of these allegations, as I must, I conclude that these concrete harms are far different than the harms alleged in the line of Supreme Court cases that Defendant relies upon, including Spokeo, Inc. v. Robins, 578 U.S. 330 (2016), in which there were ephemeral statutory violations entirely divorced from real-world concrete injuries. Second, I conclude that Section 198 of the New York Labor Law provides a private right of action for the late payment of wages.

It is well established that I am bound to apply the law as interpreted by a state's intermediate appellate courts unless there is persuasive evidence that the state's highest court would reach a different conclusion. See, e.g., V.S. v. Muhammad, 595 F.3d 426, 432 (2d Cir. 2010).

Here, I see no persuasive evidence that the New York Court of Appeals would reach a different conclusion than the First Department did in Vega v. CM & Assocs. Constr. Mgmt., LLC, 107 N.Y.S.3d 286(N.Y. App. Div. 2019), when it held that Section 198 expressly provides a private right of action to remedy the untimely payment of wages. Defendant's assertion that Vega is "poorly reasoned" is insufficient for me to conclude that Vega will be overturned or abrogated.

As Plaintiff notes, every district court in this Circuit to consider the issue has followed Vega. I will do the same, substantially for the reasons explained by Judge Kovner in Rodrigue at *5 and Caul at *2-3 and Judge McAvoy in Mabeat *2-8.

Third, contrary to Defendant's arguments, I — at least tentatively — conclude that liquidated damages in the form of 100 percent of the wages that were paid late are available as a remedy under the Labor Law.

There is less precedent on this issue than on whether a private right of action exists at all, but the cases that do examine it, such as Rodrigue and Carrera v. DT Hosp. Grp., No. 19-CV-4235(RA), 2021 WL 6298654 (S.D.N.Y. Dec. 7, 2021), conclude that liquidated damages are an appropriate remedy and measure those damages by the wages paid late.

Moreover, I am persuaded by the reasoning of Vega, which noted that liquidated damages are appropriate to compensate workers for the late payment of wages because the exact damages may be difficult to prove with precision. 107 N.Y.S. 3d at 288.

I will confess that I have some sympathy for the view expressed by Judge Seibel in the transcript that Defendant submitted last week (at ECF No. 42) — namely, that liquidated damages in the form of the unpaid wages is a "kooky" remedy where the injury is the time value of the delayed payment and

that it may raise due process issues - and, should as well note that, if I had authority to do so, I might well find that certification to the New York Court of Appeals would be appropriate.

But Defendant did not actually raise the due process issue here and, in any event, I agree with Judge Seibel and with Judge Kovner's view in Rodrigue (at *6) that a due process challenge would be premature at this stage.

Finally, I conclude that the fact that Plaintiff was paid a salary is irrelevant.The definitions section of Article 6 of the Labor Law defines"[w]ages" as "the earnings of an employee for labor or services rendered, regardless of whether the amount of earnings is determined on a time, piece,commission or other basis." N.Y. Lab. Law §190. In the face of that broad, open-ended definition, Defendant relies on cases from the nineteenth century, including In re Stryker, 158 N.Y. 526 (1899).

But this reliance is misplaced, not the least because these cases were not interpreting the language of the current statute. As the New York Supreme Court explained in Jordan v. Schreiber, Simmons, Macknight & Tweedy, No. 10506/93, 1994 WL 108011, at *2 (N.Y. Sup. Ct. Feb. 23, 1994), reliance on Stryker is "unpersuasive as it ignores the definition of 'wages' and 'employees' which the legislature included in [S]ection 190 of the amended Labor Law" in 1966 and "is also

inconsistent with more recent case law."

Recent cases do not support the distinction between wages and salary that Defendant urges, and I conclude that the definition of wages in Section 190 encompasses a broad range of possible methods of monetary compensation for labor or services rendered, including salary. For those reasons, Defendant's motion was denied.

For all of those reasons, defendant's motion was denied.

So that's my ruling on the motion. And I, as noted in the order, want to talk about the motion for class certification, in part, based in part on that ruling.

I'm happy to set a briefly schedule. But I guess more broadly wondered whether there was any dispute about class certification. I certainly recognize that defendants might have had arguments on the merits.

But in light of the ruling, there are fewer such arguments to be made at this stage. And in any event, defendants might have some interest in a classwide resolution, to the extent they would prevail -- obviously that would be res judicata as to all class members.

Regardless, it would provide global resolution if there were an alternative form of resolution.

So I guess I'll put the question to defense counsel. Ms. Schild or Ms. Cardin, is there a dispute about class

certification? If so, let's talk about a briefing schedule. Or do you want to think about it?

MS. CARDIN: Yes, your Honor, there is a dispute.

THE COURT: Can you state your name.

MS. CARDIN: Yes. There is a dispute about class certification. So a briefing schedule would be appropriate.

I also wonder, your Honor, because I know that we teed up the issue about the appropriate measure of damages in connection with a motion to dismiss. And obviously we have just heard your ruling and are still digesting it.

But I wonder if your Honor might be open to some separate briefing on that issue that we could work on alongside the class cert and completing discovery issue because I hear you on the premature issue.

But I think the way these cases have been playing out, that's an issue that really needs to get decided and get to the Court of Appeals so that there can be certainty one way or the other.

So the short answer to the question is yes, we would like a briefing schedule on the class cert issue and are also requesting additional briefing on the appropriate measure of damages here, if your Honor would be open to that.

THE COURT: What would be your proposed vehicle for that? I'm open to it only in the sense that I think it is probably -- I don't know what metaphor or expression to use --

probably the big issue here and to the extent that there is to be any resolution, it would be in the interests of both sides I would think to have a more definitive answer to that question.

That being said, what's the vehicle that you would propose to do it?

MS. CARDIN: Thank you, your Honor.

I have two potential vehicles, and I recognize that this does not fit neatly into any procedure vehicle that I am aware of. But I wonder if it could be styled as perhaps a summary judgment on the issue of damages.

I know generally that's not the vehicle you would use for something like this or something along the lines of a motion for declaratory judgment as to the appropriate measure of damages.

THE COURT: I'm not aware of the latter being a thing, but the former may be. I guess the only hesitation I have is on my read of Judge Kovner's decision with respect to the prematurity of the issue at the motion to dismiss stage makes it seem as if this sort of due process issue at least would depend a little bit on the facts and circumstances inquiry whether the record is fully developed on that.

But in any event, Mr. Nussbaum, do you want to address.

MR. NUSSBAUM: Thank you, your Honor. This is Joseph Nussbaum.

Defendants already briefed this issue, and in the Court's ruling that we just heard and that our office is still digesting, your Honor said, as did Judge Kovner, that it is just premature at this stage.

Of course down the line when the defendants want to make a motion for summary judgment on the fully briefed record, that's fine. But echoing the Court, it does seem that the first initial avenue is that the class should be certified or the briefing should be completed on the class certification, and then we should take up the merits issue.

THE COURT: All right.

MS. CARDIN: Your Honor, if I may.

THE COURT: Your name though, please.

MS. CARDIN: Sure. This is Kelly Cardin again. I'm looking at the Rodrigue decision right now, and I think that part of the reason why it was found to be premature is that it was teed up on the motion to dismiss.

So when we're talking about damages here, I think that a summary judgment motion on the issue of damages might be the appropriate vehicle because at this point, we have exchanged discovery.

We've given plaintiffs the payroll records so they know the scope of damages. So this is a relatively limited issue that if we were given permission to move for summary judgment at this point, I think it would really help to clarify

the issues in this case.

So we would request permission to do that. Looking at this decision that you've cited, I think the prematurity issue really goes to the fact that it was teed up on the motion to dismiss and not summary judgment.

I suppose, in the alternative, we only have a month or so left of discovery. So perhaps we could tee it up at that point as well.

MR. NUSSBAUM: Your Honor, could I jump in for a minute.

THE COURT: Hold on.

First of all, I just want to clarify that when I said earlier that it was premature, I did mean in precisely that sense, that is to say, I didn't mean to say it's premature as of October 20. It's premature on a motion to dismiss where I'm limited to the facts alleged in the complaint.

This case is a little bit different in posture in the sense that the parties have been engaged in discovery. So in that sense, if the record is fully developed on the issue, then it may not be premature in the broader sense.

Having said that, I think Ms. Cardin's point that there is only about a month in discovery might be well taken and one possibility would be to handle the class certification and perhaps put a pause on expert discovery pending a resolution of that motion and then perhaps entertain a limited

summary judgment motion based on fact discovery alone. I also don't know if there is expert discovery to be done here, but maybe that's a separate question.

Mr. Kirschenbaum, did you want to be heard?

MR. KIRSCHENBAUM: Yes. Thank you, your Honor.

With respect to the damages in this case, they are also relatively straightforward, not necessarily in need of expert discovery. I think we can mull it over, especially in light of the substantive decision that your Honor set forth today.

But what I want to point out is that the defendants made out their argument about the measure of damages. Your Honor substantively ruled, but I guess there is this next argument of due process which is not currently a live issue in this case.

It's been tangentially raised in other cases, but there is nothing sitting out there that makes one think that the due process argument needs to be addressed right this second.

But what I would say is that given the straightforwardness of the argument and the zero sum nature of whether the due process argument carries the day or not, I think it makes sense for us to cross-move for summary judgment, if defendants are going to move for summary judgment.

We also don't need a lot more discovery to do that.

And if we're already going to tee things up at that level, why not just finish this. And if they win, they win. And if we win, we win.

THE COURT: Just to drill down on the expert discovery front, what expert discovery is there in this case?

MR. KIRSCHENBAUM: The real issue is --

THE COURT: This is Mr. Kirschenbaum?

MR. KIRSCHENBAUM: This is Mr. Kirschenbaum. Sorry.

THE COURT: As a reminder, please start with your name so that the record is clear so that who is speaking.

Go ahead.

MR. KIRSCHENBAUM: Really the issue is do we go into the weekly time records and figure out what each person was owed every other week?

Or do we just take all of what they were paid and divide it in half just to dumb it down a little bit, I think that's the question of expert discovery. We are totally fine doing it the more simple way of cutting it in half monthly.

I don't think that that provides us any strategic advantage as opposed to something we would have to discuss with defendants in light of today's ruling. I don't see why we would need expert discovery unless we were giving each other a hard time.

THE COURT: I think, even if it were measured based on the time value of money, it seems like it would be a relatively

simple arithmetic question. So it's not clear to me that there's a need for an expert.

Ms. Cardin.

MS. CARDIN: Thank you, your Honor.

We don't see a need for an expert at this point. With respect to the cross-motions for summary judgment, I think what opposing counsel is saying is that that would be on the merits.

And I think that that is a separate inquiry, summary judgment on the merits, that needs to be addressed after the class cert motion and after a limited summary judgment motion on damages.

So what I would ask your Honor to do is to set a briefing schedule at the close of discovery for our opposition to the motion for class cert along with a motion for partial judgment on the issue of damages. I think that would be the most efficient way to move the case forward.

MR. KIRSCHENBAUM: Your Honor, this is Mr. Kirschenbaum.

Could I just quickly respond to that?

THE COURT: Sure.

MR. KIRSCHENBAUM: If defendants want a summary judgment decision saying that the damages should not be the way they say they are, why shouldn't we be able to cross-move to say that the damages somebody exactly the way that they say they are?

THE COURT: Let's talk about a briefing schedule on class certification, and then we'll address summary judgment.

My current inclination is to say two things: One is that there is no need for expert discovery, at least at the moment. Given that, I think what we should do is finish fact discovery, I should give you a ruling on class certification; and then I think the right way for you to do this is for you guys to confer about summary judgment motion practice, in light of today's ruling, in light of the record, and see where things stand and what you plan to move on.

It may be that the only issue to move on is the question of damages, in which case, much of the discussion is academic and it's just a question of figuring out the right way to brief it. But I think that would be the best way to proceed here.

On class certification, Ms. Cardin, the motion was filed I think 11 days ago. Strictly speaking, under the local rules, you would have three more days in which to respond. But I'm obviously prepared to give you more time than that.

What's your thought on a briefing schedule?

MS. CARDIN: Thank you, your Honor.

Because it's a full motion for a class cert, we would request that you give us until two weeks after the close of discovery which would put us at December 12.

THE COURT: Explain to me why you need that time.

In other words, why is the record not sufficient for you to respond at this point? It doesn't seem like it's particularly based on the factual record. Or, to the extent it is, it seems like that doesn't necessarily mean waiting until the end of fact discovery.

MS. CARDIN: Respectfully, your Honor, I think that there is a lot of factual distinction between what these physicians were doing. And I think that our opposition, in terms of the merits, is going to be built, in large part, on the idea that in order for an individual to qualify as a manual worker, that specific individual must have been spending at least 25 percent of the working time doing manual labor.

So from our perspective, this is a highly individualized inquiry and we're going to need to put together a lot of that information in terms of what a representative sampling of the people in the purported class have been doing, because pursuant to the guidance on who is a manual worker, it is a case-by-case individual inquiry. So we need additional time to gather that information.

THE COURT: All right. Mr. Nussbaum or Mr. Kirschenbaum.

MR. NUSSBAUM: Yosef Nussbaum, your Honor. Thank you.

I don't fully understand defendant's position. The way things currently stand in discovery, they have produced all documentary evidence relating to these categories of delivery

drivers.

We took a 30(b)(6) deposition and discussed all the categories, and the result of the documents and all the testimony is that these guys are delivery drivers. There might be slight variation, but there is nothing close to anything that would take them to 25 percent or less of their time working as manual laborers.

It's somewhat concerning that there would be other information out there that defendants intend to produce -- we have three months of discovery -- that would change the current calculus.

MS. CARDIN: Your Honor, this is Kelly Cardin.

I think maybe part of the confusion is that under certain DOL opinion letters, driving itself is not manual labor. So that can't be count the towards the 25 percent.

And there has been no testimony from the 30(b)(6) and nothing in the documentation establishing what percentage of these workers' time was spent doing these other manual task.

So we're anticipating doing some depositions and gathering additional information to establish that this should not be treated on a class basis because what each individual driver was doing on a given day of a given day of a given week of a given month varies greatly across the board. So that 25 percent threshold is going to be a problem for plaintiffs here for plaintiffs here.

THE COURT: Are there not issues and facts that you would be privy to?

In other words, they seem to be within defendants' possession more than plaintiff's possession.

MS. CARDIN: We still have to depose plaintiff, your Honor. The 30(b)(6) deposition was two weeks ago. So we just need additional time. Discovery was rather short in this case. We only had a few months. So we just need additional time to gather the rest of the information and put together our opposition.

THE COURT: And are the depositions of plaintiffs scheduled?

MS. CARDIN: I don't believe we noticed it yet, but we can get that out today or tomorrow.

THE COURT: So I will set the deadline for -- well, I was going to set it for the day that discovery, fact discovery, closed. But that is the Monday after Thanksgiving.

So why don't I give you until that Friday, December 2, to file any opposition to the class certification motion. I'll give plaintiffs two weeks, December 16, to file any reply.

My inclination would be to defer summary judgment motion practice until after you have a ruling on class certification since it seems like that would have a big impact both on settlement posture but also on what the summary judgment would look like.

Does everybody agree with that? Defense is there.

MS. CARDIN: Your Honor, this is Kelly Cardin. Thank you for that briefing schedule. I may have misunderstood what Maimon was saying.

Maimon, I thought you were saying that you wanted to move for summary judgment on the merits. That's what I understood you to be saying. But I have no objection to both sides moving for partial summary judgment just on the issue of damages around the same time we're briefing this or even sooner.

I wouldn't be opposed to that. So I'm sorry that I misunderstood you, but I'm not opposed to cross-motions for partial summary judgment just on the issue of damages. It seems to me that that would help clarify the issue.

MR. KIRSCHENBAUM: This is Maimon Kirschenbaum, your Honor. Could I speak.

THE COURT: Yes, although maybe the best course here is what I averted to earlier, which is you guys should discuss this. If in fact the only issue that anybody would be moving summary judgment-wise is the damages issue, then I agree. It may not require a ruling on class certification, and it may pay to have that briefed while I'm deciding the class certification motion.

If either side intends to move more broadly, then perhaps it's a different issue and I would need to decide

whether I would allow piecemeal summary judgment practice or not.

So I guess my inclination is to let you guys talk through these issues and maybe submit a joint letter proposing how to proceed on summary judgment in relation to class cert or not, let's say within a week or two of now.

Does that make sense, Mr. Kirschenbaum?

MR. KIRSCHENBAUM: I just want to address what your Honor just said, which is where my head was at.

I think that the issue on which we'd be cross-moving for summary judgment, after what your Honor's substantive order today, is the whole issue. So I do think it is piecemeal. I think it makes sense to get a class cert out of the way so that if we're going to move for summary judgment and win, then we've won for the class and, if we're going to lose, then we've lost for the class.

Defendants keep referring to it as a "partial summary judgment motion," but it's pretty much the entire ball at this point. So I'm happy to move quickly, but we've got to get class cert out of the way for this to make sense.

THE COURT: Ms. Cardin, it doesn't dissuade me from thinking that the best course here is to let you guys talk through these things and submit a joint letter proposing how to proceed. You may end up agreeing. It may be that there is more to this than either of realize at the moment. But in

either case, some time to process may make sense.

Ms. Cardin?

MS. CARDIN: That's fine, your Honor. I'm happy to think and then discuss it with opposing counsel.

THE COURT: So why don't we do that. I set the briefing schedule for class certification. So that will be fully submitted on December 16.

For the moment, I'm going to say that discovery will close with the end of fact discovery. And to the extent there is a need for expert discovery, we will revisit that at some later date.

And I will finally require that you submit a joint letter let's say within two weeks of today with respect to either an agreed upon schedule for summary judgment or competing schedules, if there is disagreement.

I will note that to the extent that the motions are overlapping -- well, actually, regardless, I will say if both sides intend to move, my preference would be to structure things so that one side makes an initial motion, the other side then cross-moves and files an opposition and that is done in a consolidated fashion so there is a single brief cross-moving and opposing.

And then the first party would then be able to file a reply/opposition. And then the second party would file a reply so that there are four briefs rather than six briefs that cross

each other in the night. So you should confer with that in mind.

But I'll look for you to make a proposal in the first instance, both with respect to structure and with respect to a schedule and how to coordinate it with class certification.

I'm assuming that it's premature to discuss anything related to settlement because some of the issues that we've discussed today need to be resolved before any discussion on that front would be worthwhile.

Is that your view, Ms. Cardin?

MS. CARDIN: We are in settlement discussions. So I don't think we need anything from the Court on that front at this point.

Maimon, do you disagree?

MR. KIRSCHENBAUM: We've had more than just preliminary discussions at this point. So we may settle it.

THE COURT: If that changes, that is to say, if there is anything I can do to facilitate those discussions, definitely, let me know. Obviously let me know if you reach settlement, as you probably will have to do, given the nature of the case. Otherwise, I won't do anything on that front now.

Anything else, Mr. Kirschenbaum?

MR. KIRSCHENBAUM: Nothing further here, your Honor.

THE COURT: Ms. Cardin?

MS. CARDIN: Nothing further here, your Honor. Thank you.

THE COURT: Thank you very much. Have a great day.

MS. CARDIN: Thank you.

MR. KIRSCHENBAUM: Thank you.

(Adjourned)